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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 1189

DE BEERS CONSOLIDATED MINES, LTD., DIAMOND CORPORATION, LTD. AND DIAMOND TRADING COMPANY, LTD.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUHERN DISTRICT OF NEW YORK AND MOTION FOR LEAVE TO FILE

ROBERT T. SWAINE,
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New York, N. Y.

April 5, 1945.

IN THE

Supreme Court of the United States

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DE BEERS CONSOLIDATED MINES, LTD., DIAMOND CORPORATION, LTD. and DIAMOND TRADING COMPANY, LTD.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI.

Now comes WM. DWIGHT WHITNEY, counsel for petitioners above-named, appearing specially herein for the purpose of this motion and reserving all rights under the motion now pending in the District Court of the United States for the Southern District of New York to quash the purported service of process upon them and to dismiss the complaint against them upon the ground that said Court has no jurisdiction over the persons of any of them, and respectfully moves this Court for leave to file the petition for writ of certiorari, hereto annexed, under §262 of the Judicial Code (28 U. S. C. sec. 377), directed to the District Court of the United States for the Southern District of New York, to review an order of that Court, entered

April 3, 1945, more particularly described in the petition, and for such other and further relief as may be just and proper.

WM. DWIGHT WHITNEY,
Counsel for Petitioners,
15 Broad Street,
New York, N. Y.

April 5, 1945.

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DE BEERS CONSOLIDATED MINES, LTD., DIAMOND CORPORATION, LTD. and DIAMOND TRADING COMPANY, LTD.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners above-named, appearing specially herein for the purpose of this petition and reserving all rights under a motion now pending in the District Court of the United States for the Southern District of New York to quash the purported service of process upon them and to dismiss the complaint against them upon the ground that said Court has no jurisdiction over the persons of any of them, respectfully pray for a writ of certiorari to the District Court of the United States for the Southern District of New York to review an order of that Court entered

April 3, 1945, granting respondent's motion for preliminary injunction. A transcript of the record in this case is furnished herewith in accordance with Rule 38, par. 1 of the Rules of this Court.

STATEMENT

The learned District Judge has entered an order entitled "Preliminary Injunction" (R. 171), which however is in substance solely a sequestration of the bank account of petitioner De Beers in a New York bank, amounting to $59,320. The order does not purport to enjoin the petitioners from any restraint of trade or other action cognizable under the Sherman or Wilson Acts. It was sought by the government as a "sequestration" (R. 29) and was granted as such.

The Court's opinion and conclusions of law purport to find power to grant the order under § 4 of the Sherman Act *and* under the same section of the Judicial Code upon which this Petition for Writ of Certiorari is based,—§ 262, 28 U. S. C. § 377. The opinion states (R. 168):

> "that if the injunction does not issue, the assets of the corporate defendants will in all probability be withdrawn from this country. In that event, if the government should succeed in establishing its cause, there would be no way to enforce the decree of the court."

The cause which the government is seeking to establish is one in which the petitioners are charged with the wrong of *not* doing business within the United States.

In form, it is a suit in equity under §§ 1 and 2 of the Sherman Anti-Trust Act (Act of July 2, 1890, c. 647, 26 Stat. 209, 15 U. S. C. §§ 1 and 2) and § 73 of the Wilson

Tariff Act (Act of Aug. 27, 1894, c. 349, 28 Stat. 509, as amended by Act of Feb. 12, 1913, c. 40, 37 Stat. 667, 15 U. S. C. § 8).

The government's complaint, verified by Edward S. Stimson, Esq., Special Assistant to the Attorney General on January 27, 1945, was filed on January 29, 1945, against the petitioners (all South African corporations) and six other foreign corporations and seven individuals. None of the individuals is alleged to, or does, have any connection with the petitioners, except that one Parkinson is alleged to be an officer of De Beers. This is denied,[1] and in any event Parkinson has not been served. The other individual defendants are alleged to have some connection with various corporate defendants other than the three petitioners herein.

The entire subject-matter of the action has to do with the diamond industry in Africa and in England. The theory of the complaint is that the defendants have engaged in an unlawful combination with the intent of restraining diamond imports into the United States. The case falls within the field of the law considered by this Court in *American Banana Company* v. *United Fruit Company*, 213 U. S. 347, and *United States* v. *Sisal Sales Corporation*, 274 U. S. 268. Petitioners are advised that the case clearly falls within the doctrine of the *Banana* case and outside the doctrine of the *Sisal Sales* case.

The allegations of fact in the record before the District Court are found in the verified complaint, in an additional affidavit for the government verified by the same Special Assistant to the Attorney General who verified the complaint (R. 66), and in ten affidavits verified by residents of

[1]Denials are found in the affidavits filed on behalf of petitioners.

the United States on behalf of the petitioners (R. 85 *et seq.*).

A temporary restraining order was granted *ex parte* to the government on January 29, 1945, and was forthwith served upon a number of banks. Admittedly too sweeping in its terms, it was modified in successive restraining orders issued at ten day intervals and in the eventual order for preliminary injunction (sequestration). During the intervening two months counsel were retained by cable for petitioners and appeared specially to question jurisdiction and to contest the injunction. Counsel communicated by cable and letter with their clients in England and South Africa and received cable responses; but under war-time conditions affecting the mail there was no time to receive affidavits or other documents or correspondence from the clients (R. 131).

The affidavits for the petitioners served a three-fold purpose:

(1) To prove that there was no jurisdiction in the Southern District of New York or anywhere in the United States over the persons of the petitioners,

(2) To show that allegations of the complaint, possibly material, were erroneous in fact, and,

(3) To show that there was no ground upon which to support the preliminary injunction, assuming that as a matter of law the District Court had power to grant an injunction (a sequestration) of the character granted.

In effect, the position taken by the petitioners before the District Court was that (1) the injunction must be denied

because the action was unfounded both (a) because the Court lacked jurisdiction over the persons of the defendants-petitioners and (b) because the complaint, perhaps on its face and in any event when read together with the defendants' affidavits, exhibited a case of too dubious a character to support any preliminary injunction, and (2) that the preliminary injunction in itself exceeded the Court's power, as it was not an injunction of the nature provided for under the anti-trust laws.

The facts upon which there is no substantial dispute, and which establish the general subject-matter of the case, are:

(1) That the first two petitioners (De Beers and Diamond Corporation) are engaged in the Union of South Africa in mining and/or purchasing from other miners raw uncut diamonds, and are required to sell their diamonds exclusively through a pool established by statute of the Union of South Africa.

(2) That the petitioner Diamond Trading Company, Ltd., also a South African company, is engaged in selling raw uncut diamonds in London.

(3) That the other corporate defendants either are, or own stock in, diamond mining companies operating in Africa, the products of which companies are also sold in their raw uncut form in London by the petitioner Diamond Trading Company, Ltd.

(4) That none of such corporations conducts a regular business of exporting into the United States

or selling within the United States.[2] Purchasers desiring to have stones cut and polished for the American market and to sell in America purchase the raw uncut diamonds from the petitioner Diamond Trading Company, Ltd in London.

(5) That the trade alleged to be restrained is the import and sale (by others than the defendants) of diamonds (principally industrial diamonds) in the United States.

We must assume upon this petition that the agreements in the Union of South Africa and in the United Kingdom are such as would, if they were made and existed in the United States, be violative of the Sherman Act. It is precisely because the parties to those agreements are not present within the United States and do not do business here that the government has sought a sequestration of their property here, upon the ground that otherwise they will have no reason to consent to the jurisdiction of the United States courts and no reason to accept extra-territoriality

[2] DeBeers made a single sale in the United States in 1940—of the jewels exhibited by it at the New York World's Fair (R. 128). Diamond Corporation made a single sale in the United States—to, and at the request of, the Procurement Division of the United States Treasury Department (R. 128). Diamond Trading Company has made no sales in the United States, but has made three sales in London to, and at the request of, United States Government Agencies (to the Treasury Department in 1941, to Metals Reserve Company in 1942 and to United States Commercial Company, a subsidiary of Reconstruction Finance Corporation, in 1944 (R. 129). These last four sales were all in connection with the war effort, as was the deposit of a stock pile of diamonds made in Canada pursuant to treaty between the governments of the United States, Canada, and of the United Kingdom (R. 137).

for United States law. This is recognized in the order of the District Court where, in the paragraphs next after the one already quoted, it says:

> "The resulting damage to the government, if I were to deny this motion, is incomparably greater than any damage to the corporate defendants if I were to grant the motion.
>
> "Equity will take necessary steps to protect its jurisdiction where, as here, there is a great probability that the enforcement of its decrees will otherwise be frustrated."

JURISDICTION TO REVIEW

The date of the order of the District Court for the Southern District of New York sought to be reviewed was April 3, 1945.

Jurisdiction of this Court is invoked under Judicial Code §262 (36 Stat. 1162, 28 U. S. C. §377).

This Court has exclusive appellate jurisdiction in equity suits by the Attorney General under the Sherman anti-trust law.[3] Judicial Code §238 (28 U. S. C. §345). Expediting Act of Feb. 11, 1903, c. 544, 32 Stat. 823, as amended by Act of June 25, 1910, c. 428, 36 Stat. 854 (15 U. S. C. §29). These statutes read:

> "Sec. 238. A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following Acts or parts of Acts, and not otherwise:

[3]Petitioners have, however, *ex majore cautela*, filed a notice of appeal in the 2nd Circuit Court of Appeals, under §129 of the Judicial Code, Act of March 3, 1891, c. 517, 26 Stat. 828; 28 U. S. C. §227.

(1) Section 2 of the Act of February 11, 1903, 'to expedite the hearing and determination' of certain suits brought by the United States under the antitrust or interstate commerce laws, and so forth."

Expediting Act, §2 (15 U. S. C. §28).

"Sec. 2. In every suit in equity pending or hereafter brought in any district court of United States under any of said Acts, wherein the United States is complainant, including cases submitted but not yet decided, an appeal from the final decree of the district court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof: *Provided*, That in any case where an appeal may have been taken from the final decree of a district court to the circuit court of appeals before this Act takes effect, the case shall proceed to a final decree therein, and an appeal may be taken from such decree to the Supreme Court in the manner now provided by law."

This Court has said that under these statutes no appeal from an interlocutory order lies to the Circuit Court of Appeals. *United States* v. *California Co-Operative Canneries*, 279 U. S. 553, 558-9. The question as to the exercise of a discretionary power to entertain the petition without prior hearing in a Circuit Court of Appeals, which divided this Court in *Ex Parte Peru*, 318 U. S. 578, is absent here.

This Court granted on March 5, 1945, petitions in Nos. 1016 and 1017, *United States Alkali Export Association, Inc.* v. *United States*, and *California Alkali Export Association* v. *United States*, requesting however that counsel "discuss in their briefs and upon oral argument the question whether the order of the District Court may appropri-

ately be reviewed at the present stage of the proceeding of the writ of certiorari under §262 of the Judicial Code." There are present in this case features which were absent in Nos. 1016 and 1017, as follows:

(1) Actual sequestration of property of the petitioner De Beers, for which a petition under §262 is the only available form of appellate relief.

(2) An order entered below under purported authority of §262 itself, and therefore falling within the class of orders which the Solicitor General conceded (in his brief in opposition to grant of the writ in Nos. 1016 and 1017) to provide a characteristic occasion on which this Court had granted the writ. His brief read at p. 6:

> "* * * We summarize immediately below the circumstances under which this Court has issued certiorari under that Section [262]. Certiorari has thus issued * * * (4) to review the action of circuit courts of appeals with respect to the issuance of writs under Section 262 itself;" citing *Whitney v. Dick*, 202 U. S. 132, and *McClellan v. Carland*, 217 U. S. 268.

In view of the actual present and continuing injury to the petitioners consequent upon the order of the District Court, it is submitted that the question is an urgent one entitled to preference. This consideration might be satisfied in a manner convenient to the Court if the writ be granted and the case be set for argument immediately following Nos. 1016 and 1017.

We are aware that other defendants (known as Forminiere and Diamang) are filing a similar petition. This case and their case has its own particular facts, presented independently upon different affidavits.

Counsel for the petitioners in these two cases took a differing view in the District Court as to the questions before that Court for decision. Our view was not accepted by the learned District Judge, whose rejection of it is expressed in the concluding paragraph of his opinion (the paragraph next following the three already quoted):

> "During the course of argument, the question was raised by counsel of whether the court should deal with the problem of the defendants' doing business here, as ancillary to the question of the preliminary injunction. I am not passing upon the defendants' doing business, because in my opinion, that question is not before the court on the instant motion."

And also in the order itself:

> "* * * After reading the verified complaint and the affidavits submitted by plaintiff and defendants and hearing argument and duly considering the same (but *without considering the question whether the foreign corporate defendants are doing business in the United States, which question is not before the Court on this motion*, and without prejudice to the rights of the foreign corporate defendants to have such question and the question of the sufficiency of service of process determined later), *this Court, for the purposes of this motion only, adopts and incorporates herein as findings of fact the facts alleged in said complaint* and upon said complaint and said affidavits finds as facts * * *". [Emphasis ours].

The opinion of the learned District Judge was dated March 28, 1945 (R. 170), but the defendants' affidavits answering the Stimson Affidavit which was dated March

9, 1945) had only been filed with the District Court within the last days immediately preceding the Judge's decision of the motion and obviously, in view of the brevity of his opinion and his view that the "question" of jurisdiction was not before him, did not command his objective attention.

The other defendants who are petitioning here took the view throughout the proceedings below that the record was insufficient to permit the Court to pass upon the question whether the defendants were doing business in the United States. What we submitted, was that assuming *arguendo* that the preliminary injunction (sequestration) order was otherwise proper as such, nevertheless the Court, upon its attention being called to the questions whether jurisdiction had been obtained over the persons of the defendants and whether the complaint stated facts sufficient to state a cause of action, could not grant the preliminary injunction without also considering the record before it upon those issues and satisfying itself that there was no insuperable objection to the order on either of those alternative grounds.

QUESTIONS PRESENTED

(1) Whether in a suit in equity by the Attorney General seeking an injunction against alleged violation of §§1 and 2 of the Sherman Anti-Trust Act and §73 of the Wilson Tariff Act, the District Court has power to grant a preliminary order enjoining the defendants.

(a) From withdrawing money belonging to them from banks.

(b) From withdrawing any property owned by them from the United States,

(c) From selling, transferring or otherwise disposing of property belonging to them in the United States,

and enjoining all persons having notice of the order from assisting any of them to violate such order.

(2) Whether in such a suit the District Court has power under Judicial Code §262 (28 U. S. C. §377) to issue a writ having the effect of sequestering property of a defendant until the case shall have been determined.

(3) Whether in such a case the District Court abused its discretion in basing its findings only upon the facts as alleged in the complaint and in an affidavit verified by a Special Assistant to the Attorney General, when there were before the Court other detailed affidavits from persons in a position to have closer knowledge of the facts than the Special Assistant to the Attorney General and refuting the material statements in the complaint and in his affidavit.

(4) Whether in such a case and under such circumstances the Court may fulfill its duty to make findings of fact by adopting and incorporating as its Findings of Fact the allegations in such complaint and affidavit.

(5) Whether in such a case the District Court abused its discretion in granting such a preliminary injunction solely on the ground that the defendants are corporations of nations other than the United States of America and could

quickly withdraw their assets from the United States before the entry of a final decree in the cause and if the preliminary injunction were denied would in all probability do so, in which event if the government should succeed in establishing its cause there would be no way of enforcing the decree of the Court.

(6) Whether in such a case the District Court may refuse to consider the question raised by counsel for the defendants of whether upon the record before the Court the claim that defendants were doing business in the District or in the United States of America was sufficiently rebutted so as to constitute an insuperable obstacle to the grant of such a preliminary injunction.

(7) Whether upon the record before the Court the claim that defendants were doing business in the District or in the United States of America was sufficiently rebutted so as to constitute an insuperable obstacle to the grant of such a preliminary injunction.

(8) Whether even upon the face of the government affidavits the petitioners could be held to have been "found" within the United States.

(9) Whether even upon the face of the government affidavits the petitioners could be held to have been served with process within the United States.

(10) Whether upon the record before the Court the material allegations of the complaint were not sufficiently rebutted so as to constitute an insuperable obstacle to the grant of such a preliminary injunction.

(11) Whether the complaint states a claim entitling the government to relief.

(12) Whether the Courts of the United States should decline jurisdiction of the case under the principles of territoriality recognized in the law of nations and applied by this Court.

REASONS FOR GRANTING THE WRIT

1. Damage to the Petitioner De Beers is real and immediate.

$59,320 belonging to De Beers, a company organized under the laws of the Province of the Cape of Good Hope, Union of South Africa, and having its sole business there, has been sequestered in a bank account in New York, so that the money is unavailable to it pending the determination of this case. Indeed, on the theory of the Court's order, which followed the theory of the government's request for the order, this money is in effect expropriated from De Beers unless De Beers consents to a jurisdiction which does not otherwise exist.

2. The sequestration of the funds is without and support in law.

This is a civil action in equity. Property may not be seized in advance of judgment except under the terms of Rule 64 F.R.C.P. Under Rule 64 such remedy is available only under the circumstances and in the manner provided by the law of the State in which the District Court is held. Under the law of the State of New York there is no right to seize property in advance of judgment in an equity case. New York Civil Practice Act §902. 7 Carmody, New York Practice §309. *Thornington* v. *Merwick*, 101 N. Y. 5.

This seizure was made immediately upon the filing of the complaint (verified only by a government attorney) and was made without notice to the petitioners,—indeed before the petitioners knew of the existence of the litigation. This was done on the theory that it would deprive the Court of jurisdiction if the petitioners were to withdraw the funds from the United States. In other words, it was sought to obtain jurisdiction through the seizure, or alternatively to force the petitioners (as a practical matter) to consent to the jurisdiction in order to obtain release of their funds from the seizure.

3. It is settled law that a sequestration is not a remedy available under the antitrust laws.

This is settled law in this Court. *Paine Lumber Co.* v. *Neal*, 244 U. S. 459. *Geddes* v. *Anaconda Copper Mining Co.*, 254 U. S. 590. *Wilder Mfg. Co.* v. *Corn Products Co.*, 236 U. S. 165.

It is also settled law in this Court that the injunctive relief provided by §4 of the Sherman Act, §15 of the Clayton Act, and §74 of the Wilson Act (15 U. S. C. §§4, 9, 25) must be confined to injunctions "to prevent and restrain" violations of the antitrust laws. *Standard Oil Company of New Jersey* v. *United States*, 221 U. S. 1, 77. *United States* v. *U. S. Steel Corporation*, 251 U. S. 417, aff'g. 223 Fed. 55.

The present order makes no pretense, so far as sequestration of the $59,320 is concerned, of being an injunction to prevent and restrain violation of the anti-trust laws.

This is not a case in which those sections of the anti-trust laws are invoked which permit seizure or forfeiture

of the articles of commerce which are themselves the subject-matter of the illegal conspiracy (§6 of the Sherman Act and §76 of the Wilson Tariff Act, 15 U. S. C. §§6, 11).

4. There is no jurisdiction over the persons of the defendant.

Under federal procedure property may not be attached if the Court has no jurisdiction over the persons of the defendants. *Big Vein Coal Co.* v. *Read*, 229 U. S. 31. *Rorick* v. *Devon Syndicate*, 307 U. S. 299, 309-313.

The Court below expressly declined to pass upon this question, notwithstanding that it is the duty of the Federal Court to satisfy itself of its jurisdiction preceding the grant of an injunction. *Eagle Glass & Mfg. Co.* v. *Rowe*, 245 U. S. 275, 279, 280. *Mitchell* v. *Maurer*, 293 U. S. 237, 244. The petitioners' contest of jurisdiction was raised promptly at the first hearing on the motion in February and at every subsequent hearing. It was supported by voluminous factual affidavits, all of which the Court ignored. A holding that the activities of petitioners subjected them to the jurisdiction of the Court below would be in plain violation of the principles laid down by this Court in *Green* v. *C. B. & Q. Ry. Co.*, 205 U. S. 530, and *People's Tobacco Co.* v. *American Tobacco Co.*, 246 U. S. 79, 87.

5. The complaint fails to state a cause of action.

It is further essential to the grant of a preliminary injunction that the complaint, upon which it is sought to be based, itself state facts sufficient to constitute a claim to the relief to which the plaintiff claims to be entitled. This has been repeatedly held. *Denver* v. *New York Trust Co.*, 229 U. S. 123, 136. *Mecanno, Ltd.* v. *John Wanamaker*,

253 U. S. 136, 141. *Deckert* v. *Independence Corp.*, 311 U. S. 282, 287.

The petitioners raised this point promptly also, filing a full brief upon the subject at the argument before the District Court and amplifying the brief by oral argument. The Court ignored the entire subject in its opinion and substituted an adoption of the allegations of the complaint as the Court's findings of fact.

6. The question is a novel one in this or any other Appellate Court.

Apparently in at least one prior case the Department of Justice has sought to attach property of a foreign defendant in order to force it into our jurisdiction. *United States* v. *I. G. Farben*, Criminal 109-189, 190, 191 (S. D. N. Y., 1941). The defendant in that case apparently submitted, in consideration of the sequestration being reduced to an amount equal to the maximum amount of the fine that might result from ultimate conviction. There are no reports of appeals or even of opinions on the question in the trial courts. A recent law review writer, at a loss to explain the basis for the supposed remedy, suggested that it might be a revival of the common law writ of *distringas*. *Oseas, Antitrust Prosecutions of International Business*, 30 Cornell Law Review 42 (September 1944). There were apparently two analagous common law writs:

(1) The writ of *distringas* was applicable when a corporation could at common law defeat a criminal charge by standing mute, whereupon sequestration of its property was resorted to by writ of *distringas* to force it to answer. There is no recorded case of its being used to force foreign corporations within the jurisdiction of England; and it was early held that the writ was not adapted to this country.

State v. *Ohio & Mississippi Ry. Co.*, 23 Ind. 362. *State* v. *Western North Carolina R. R. Co.*, 89 N. C. 584. *Boston, Concord & Montreal R. R.* v. *The State*, 32 N. H. 415. *Commonwealth* v. *Lehigh Valley R. R. Co.*, 30 Atl. 83 (Pa.).

(2) The writ of *peine forte et dure* served a similar purpose to force an individual who stood mute to plead; he was placed in a

> "low dungeon into which no light could enter; he was to be laid down, naked, on his back, on the ground, his feet and head and loins covered, his arms and legs drawn apart by cords tied to posts, a sharp stone under his back, and as much weight of iron or stone as he could bear, or more than he could bear, placed on his chest. He was to have the next day three morsels of barley bread, without drink; the next, three draughts, as much each time as he could drink, of the nearest stagnant water to the prison, without bread; and such was to be his diet on alternate days, till he died." 3 Bouvier's Law Dictionary, p. 2551 (8th ed. 1914), citing 4 *Blackstone's Commentaries*, p. 324.

7. The order has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

This is true on several grounds.

First. The order was based upon an opinion which in turn was based upon the following finding of fact (R. 169):

> "The facts alleged in the verified complaint are adopted by the Court and incorporated herein as Findings of Fact for the purpose of this motion only."

The verification of the complaint was by a government attorney. Every material allegation of the complaint was contested by sworn affidavits made by persons having a closer knowledge of the facts than would have been available to an attorney in the action.

Second. The opinion was based upon conclusions of law which were (1) that the power to grant the order arose under §4 of the Sherman Act, (2) that it arose under §377 of Title 28, U. S. C. A., and (3) that the Court exercised its discretion to grant the motion. The third conclusion is meaningless. The first conclusion, in respect of §4 of the Sherman Act, was groundless for the reasons given under No. 3 above. The second conclusion, in respect of §262 of the Judicial Code (28 U. S. C. §377), was groundless for the reasons given under No. 6 above.

Third. The only statement of fact contained in the entire opinion was that

> "It is alleged that as one of the results of the conspiracy, the United States Government has been prevented from accumulating a stock pile of industrial diamonds in this country for military purposes." (R. 168)

This statement was, as it implies, based upon a mere allegation. It disregarded the submission by petitioners (both as an exhibit to their brief on the argument, and as an exhibit to an affidavit later incorporated in the record) of a true copy of a treaty between the governments of the United States of America, the United Kingdom and the Dominion of Canada, expressly providing for setting up the stock pile in Canada for military purposes. (R. 137)

Fourth. The opinion recited that the learned District Judge was convinced that damage would result to the government from withdrawal of their funds by the petitioners —damage "incomparably greater than any damage to the corporate defendants if I were to grant the motion." No question of damage to the United States Government could possibly arise. The theory was, as stated in the very next sentence of the opinion, that the sequestration was necessary to protect the jurisdiction of Equity. This was a plain fallacy.

Fifth. The opinion expressed the refusal of the District Court to pass upon the defendants' doing business in the United States, notwithstanding that the petitioners raised that issue at the outset and submitted voluminous factual affidavits in support thereof.

8. The whole case is unfounded, as it would represent a dangerous incursion by the Judicial Department into the conduct of the foreign affairs of the United States.

Under those principles of international judiciary comity sometimes known as "the law of nations", it has been the almost universal practice among civilized peoples not to seek to impose their laws upon foreigners subject to the laws of other nations and not doing business within the nation in which the Court is sitting. The present case is a violation of this fundamental principle.

The theory of the complaint, as presented to the District Court, was that combinations (i) which would be illegal in the United States under the Sherman Act would be legal—indeed might be required by statute (and in this case were shown by the affidavits to be required by statute)—in South Africa and in Great Britain, and yet (ii) might

have, or be intended to have, an indirect effect upon commerce in the United States. From this it was argued that the only relief available to the United States would be to force the foreign parties within the jurisdiction of the United States by sequestering their bank accounts and other properties here.

The theory is precisely the same that would be applied if, for example, (1) Russia were to sequester any property of American companies found in the Soviet Union upon the theory that by their competitive practices they were threatening to disrupt the harmony of a stabilized economy, or (2) the Courts of England were to seize the properties in England of American cotton farmers, because under the Capper-Volstead Act and other legislation American cotton farmers might be planning to avoid a collapse in cotton prices by operating in harmony with the Secretary of Agriculture to avoid dumping their cotton at low prices, with the consequence of a tendency to enhance cotton prices in Lancashire.

The precise charge against the petitioners is that they agreed in South Africa and England not to compete lest their product be dumped into the United States at low prices.

Even if such litigation were not objectionable on principle, it might still be prudent to refrain from it, in view of the fact that the United States is the most prosperous trading nation today and therefore the most vulnerable to retaliatory litigation of this character in the courts of foreign countries.

That the proposed procedure would constitute a dangerous invasion of a function, which, under the wise rule laid down in the *American Banana* case, 213 U. S. 347, is re-

served to the Executive Department, is aptly illustrated by the official announcement yesterday morning on the part of the State Department that an agreement has been made with Chile to the effect that America's war time synthetic nitrogen plants will not compete in peace time with the Chilean nitrate industry, this agreement having been made at the recent Mexico City conference. This is an agreement of precisely the character which the Department of Justice has under attack in the present case. Instances could be multiplied. We have selected this one only because it is the most recent to have been announced.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Court directed to the District Court of the United States for the Southern District of New York sitting in the Borough of Manhattan, City, County and State of New York, commanding said Court to certify and send up to this Court on a day to be designated a full and complete transcript of the record and of all proceedings in said District Court had in this case, to the end that this case may be reviewed and determined by this Court; that the order of said District Court be reversed; that the complaint herein be dismissed; and that your petitioners be granted such other and further relief as may appear proper.

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April 5, 1945.